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No. 84-858

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID TARTER, et al.,

Respondents

v.

WILLIAM RAYBUCK, et al.,

Petitioners

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT REPLY BRIEF OF PETITIONERS

DENNIS M. WHALEN
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone (216) 929-4291
Counsel of Record for Petitioners

G. FREDERICK COMPTON, JR.
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone (216) 929-4291
Counsel for Petitioners

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ARGUMENT

The Respondents, in their opposing Brief, have clearly misstated some of the factual matters which were adduced by the District Court from the testimony and other evidence presented at the trial. The Respondents indicate in their Brief at page two (2) that David Tarter removed his coat, shirt, boots, and socks, at the request of Petitioners Raybuck and Spargur, because he "was scared." However, the District Court, who was in the best position to observe the demeanor of the witnesses, weigh the evidence, and carefully consider the pleadings, specifically concluded that "the plaintiff David Tarter freely and voluntarily consented to a search of his person to the extent that a search was conducted." 556 F. Supp. at 629 (App. B, p. B-42). In addition, the District Court went on to state that even assuming *arguendo* that David Tarter was intimidated by the presence of his high school principal to consent involuntarily, the search would not necessarily be unconstitutional. 556 F. Supp. at 629 (App. B, pp. B-42-43). The District Court then applied a standard of reasonableness identical to the standard recently stated by this Court in *New Jersey v. T.L.O.*, ____ U.S. ____ (1985), and concluded that Petitioners Raybuck and Spargur "acted reasonably in connection with the search of David Tarter on March 3, 1981." 556 F. Supp. at 630 (App. B, p. B-44). Thus, contrary to the assertion of the Respondents and the Court of Appeals, "the District Court's analysis of the award with respect to the fourth amendment claim was [not] limited only to his determination that because consent was freely given, plaintiff's claim was groundless." 742 F. 2d at 988 (App. A, p. A-34). Rather, the District Court not only analyzed the question of consent, but also considered "the reasonableness, under all the circumstances, of the search" as this Court subsequently mandated in its recent decision in *T.L.O.*, ____ U.S. at ____, and, based upon its analysis, the District Court concluded that the Respondents' action was "frivolous, unreasonable, or without foundation'" 556 F. Supp. at 631 (App. B, p. B-46), and it granted the Petitioners judgment on their counterclaim for reasonable attorney fees

pursuant to the provisions of 42 U.S.C. §1988. 556 F. Supp. at 632 (App. B, p. B-47).

On page three (3) of their Brief, the Respondents assert that Respondent Judy Tarter had not been informed that the expulsion of David Tarter from school was only for that year. This statement is simply not true. The District Court expressly concluded that

> [t]he complaint was filed in September of 1981 after David Tarter, as a matter of law, was eligible to return to school because his expulsion was for only the semester, consistent with the provision of Ohio Revised Code §3313.66. *The fact that the expulsion was for only the period of a semester was clearly indicated by a letter mailed to the plaintiffs following the expulsion.* See Exhibit 5.
>
> 556 F. Supp. at 631
> (App. B, p. B-47)
> (Emphasis Added)

In addition, the record clearly reflects that, upon cross examination, Judy Tarter acknowledged receiving this letter (Tr. pp. 48-49). One of the prayers for relief requested in the Respondents' Complaint was that the Court order the Petitioners to permit David Tarter to reenter Cuyahoga Falls High School. Yet, the record establishes and the District Court found that at the time the Complaint was filed David Tarter was already, as a matter of law, entitled to return to school.

The Respondents on page three (3) of their Brief also indicate that the motion of the Petitioners for a directed verdict made at the conclusion of the Respondents' case "was for the most part denied." Therein lies the crux of this matter. Both the Respondents in their Brief and the Court of Appeals in its decision gloss over or ignore altogether the significant fact that the District Court concluded that there was no evidence whatsoever stating a claim against three (3) of the Petitioners, Wilson, Rovnyak, and the Board of Education; and, accordingly, the District Court sustained the motion for a directed verdict made on their behalf. 556 F.

Supp. at 626 (App. B, p. B-37). Thus, even assuming *arguendo* that the other Petitioners were not entitled to an award of attorney fees, the Petitioners respectfully submit to this Court that there is absolutely no justification whatsoever for denying an award of attorney fees to Petitioners Wilson, Rovnyak, and the Board of Education, who were dismissed from the case at the conclusion of the Respondents' presentation of evidence.

The Petitioners Wilson, Rovnyak and the Board of Education were named in the Complaint in the "non-search" causes of action. Petitioners Wilson and Board of Education were allegedly involved in the improper expulsion of David Tarter and refusal to permit David Tarter to return to school. Despite the allegations of the Complaint, the Trial Court found that

> At trial, no attempt was made to attack the expulsion procedures. Rather, the plaintiffs prosecuted claims of an unconstitutional search of the student plaintiff, David Tarter, and the false imprisonment of all three plaintiffs.
>
> 556 F. Supp. at 629
> (App. B., p. B-42)

As stated in the Petitioners' original Petition, the District Court and the Court of Appeals found from the record that the alleged false imprisonment was "patently without merit." 556 F. Supp. at 632; 742 F. 2d at 987. Petitioners Rovnyak and Rump were named only in relation to the alleged false imprisonment. Such failure to present evidence in support of their original allegations is tantamount to a frivolous use of the courts of this land and, as such, this Court should render a decision which clearly establishes the duty of a plaintiff not to misuse the availability of the judicial forum.

Finally, the Respondents assert on page seven (7) of their Brief that

> [a]lthough the District Court ultimately ruled the Respondents' suit to be frivolous, the same Court,

> in part, overruled Petitioners' Motion for a Directed Verdict. At that time it can be argued that the District Court clearly did not consider this to be a frivolous and unreasonable suit. Neither did Respondents [sic] seek a Motion for Summary Judgment. Had they done so their expenses (were their claim of frivolity capable of substantiation) would have been minimized. Should they now be allowed to profit at Respondents' expense for allowing a frivolous case to proceed to trial?

It becomes obvious that the Respondents are "grasping for straws" by attempting to shift the responsibility for this frivolous action from themselves, where it rightfully belongs, to the District Court and/or the Petitioners. However, it was not the District Court nor the Petitioners who initiated this action and continued to pursue it through extensive discovery and, finally, a trial.

In addition, with respect to the first part of the Respondents' argument, it is significant to reiterate that the Trial Court did grant a directed verdict to Petitioners Rovnyak, Wilson, and the Board of Education. Thus, taking this argument to its logical conclusion, the Respondents appear to be conceding that these three (3) Petitioners are entitled to an award of reasonable attorney fees.

With respect to the second part of the Respondents' argument, it is sufficient to state that the Petitioners viewed this lawsuit as frivolous from its inception as evidenced by the Counterclaim for reasonable attorney fees and costs incurred in their defense which was filed on October 21, 1981.

Therefore, the Petitioners as the prevailing parties in this action are entitled to an award of reasonable attorney fees and costs pursuant to the provisions of 42 U.S.C. §1988, and the decision of the Court of Appeals reversing the order of the District Court granting the same must itself be overturned by this honorable Court.

CONCLUSION

The Petitioners, individually and collectively, strongly urge this Court to grant the Petition for a Writ of Certiorari previously filed herein.

Respectfully submitted,

DENNIS M. WHALEN
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone: (216) 929-4291

Counsel of Record for Petitioners

G. FREDERICK COMPTON, JR.
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone: (216) 929-4291

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Petitioners was served upon Carmen V. Roberto, Counsel for Respondents, 1706 Ohio Edison Building, 76 South Main Street, Akron, Ohio 44308 by placing same in the regular U.S. mail service, postage prepaid, this ____ day of February, 1985.

_____

DENNIS M. WHALEN
Counsel for Petitioners